STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 9, 2006
v	No. 259296 Oakland Circuit Court
DAVID RICHARD COMMAND, Defendant-Appellant.	LC No. 04-194900-FC

Before: Markey, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the trial court improperly excluded evidence under the rape-shield statute, MCL 750.520j. I also concur with the majority's finding that the trial court properly allowed the prosecution to elicit testimony from the complainant's roommate regarding the complainant's post-incident statements as excited utterances. However, I disagree with the majority's conclusion that the trial court erred in admitting evidence that defendant had previously committed a non-consensual sexual penetration of a prior complainant when he was 16 years old. I would find that the evidence was properly admitted under MRE 404(b)(1), to establish a common scheme or plan of committing an act.

I begin my analysis of this issue bearing in mind that the admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). As to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, the determination is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Generally, the test for an abuse of discretion is very strict, and often elevates the standard of review to an apparently insurmountable height. *People v McSwain*, 259 Mich App 654, 684-685; 676 NW2d 236 (2003). I do not believe that the trial court abused its discretion in admitting prior acts of defendant.

Pursuant to MRE 402, all relevant evidence is generally admissible. However, under MRE 404(b)(1), evidence of other bad acts is inadmissible to prove an individual's propensity to

act in conformity therewith. *Crawford*, supra at 383. Such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. . . ." MRE 404(b)(1). This Court evaluates the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under the rule; (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction, if requested, was provided by the court. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The prosecution argued in its motion and on appeal that the acts were sufficiently similar to show a common scheme or plan. I agree. In both cases, the complainants alleged that defendant took advantage of them while they were too intoxicated to consent. In both cases, the complainants further alleged that defendant resorted to force when they fought back. Defendant also allegedly stripped both young women from the waist down during the assault. I would find that the similarity of these acts supports the relevance of the prior act.

Here, the similarities between the two crimes demonstrate much more than a mere propensity to engage in nonconsensual, forcible sexual activity with intoxicated women. Defendant preyed upon vulnerable women in environments where he felt comfortable and "in-control." He relied on his familiarity with the hosts and the informality of the situations to perpetrate his crimes. As the majority notes, "…the plan thus revealed need not be distinctive or unusual." *People v Sabin (After Remand)*, 463 Mich 43, 65-66; 614 NW2d 888 (2000), quoting *People v Ewoldt*, 7 Cal 4th 380, 402; 867 P2d 757 (1994). The majority argues that these similarities do not give rise to a common scheme or plan because "in each case the complainants intoxicated themselves, and the encounter with defendant was a chance meeting at the residence of mutual acquaintances." I disagree with the majority's characterization of the sequences of events in these cases as "chance." Defendant deliberately attended gatherings where he suspected he might find victims. Additionally, defendant's use of force to accomplish his goal in both cases indicates that he employed the same contingent plan if his victims were not compliant. Again, I do not believe the trial court's decision to admit this evidence was outcome determinative or that it amounted to a miscarriage of justice. *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).

Furthermore, the trial court did give the jury a limiting instruction following the testimony of the final prosecution witness regarding the 1998 incident of sexual assault. The court gave an additional limiting instruction at the close of trial:

> Now you have heard evidence that was introduced and I told you about this one earlier, but I want to repeat it again, because it is very very important. You've heard evidence that was introduced that the defendant committed a crime for which he is not on trial. If you do believe this evidence you must be very careful to consider it only for a very limited purpose. And you may only think about whether this evidence tends to show that the defendant used a plan, a system or a characteristic scheme that was used before or since. You cannot consider this evidence and you may not consider this evidence for any other purpose. For example, you may not decide it shows defendant is a bad person, or that he's likely to commit a crime or crimes. You must not convict the defendant here because you think he's guilty of other bad conduct.

> All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

Finally, I would find that the prejudicial effect of this evidence does not outweigh its probative value. The evidence of defendant's prior crime, while prejudicial, was outweighed by its highly probative nature and tempered by the trial court's limiting instruction. Further this determination is best left to the trial court which has the opportunity to make a contemporaneous assessment of the presentation, credibility and effect of the testimony. *Magyar, supra* at 416.

Although I do not believe the testimony about defendant's prior acts was more prejudicial than probative, even if it were, I do not believe that the admission of this evidence was outcome determinative. Here the prosecution began its case-in-chief by presenting the testimony of those police officers investigating the prior case. The trial court gave two very strong limiting instructions. Moreover, the testimony of the prior complainant's mother added nothing to the prosecution's case. According to the testimony of Officer Engberts, the prior complainant made several statements tending to disprove her allegation that defendant forcibly penetrated her. The prior complainant also made statements to a sexual assault nurse that were inconsistent with her trial testimony. I would not find that the trial court had "no justification or excuse for the ruling made" on the admission of the evidence of defendant's prior act. *Tate, supra* at 559.

I would reverse and remand for a new trial solely on the ground that the trial court erred in refusing to allow the admission of evidence under the rape-shield statute.

/s/ Bill Schuette